COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Victor F. Battaglia, Jr., Esquire
Biggs & Battaglia
921 North Orange Street
P.O. Box 1489
Wilmington, DE 19899-1489

Jan A. T. van Amerongen, Jr., Esq.
1225 King Street, Suite 301
Wilmington, DE 19801

Re: Izquierdo v. Sills; C.A. No. 15505-NC
Date Submitted: October 3, 2005

Dear Counsel:

Plaintiff Alfred Izquierdo ("Izquierdo") serves as a police officer with Defendant City of Wilmington's Police Department. He was disciplined for misconduct in the line of duty and brought this action to contest his punishment. At one point, his complaint contained 33 counts against more than a dozen defendants. It is now, following summary judgment motions both in the United States District Court for the District of Delaware[1] to which this matter had been removed and in this Court,[2] down essentially to one claim. Trial was scheduled,

[1] 68 F. Supp 2d 392 (D. Del. 1999).
[2] 2004 WL 2290811 (Del. Ch. June 29, 2004).

but the parties agreed to submit the matter to the Court "for decision on the paper record."[3]

Izquierdo was entitled, as a matter of contract, to a hearing on the charges against him within thirty days of "the completion of the investigation." His hearing was not commenced within thirty days of either the investigating officer's signing of his report into Izquierdo's conduct or the approval of that report by the investigating officer's commanding officer. The hearing was commenced, however, within thirty days of the delivery of the charging papers to Izquierdo. The primary question for the Court to determine, thus, is the meaning of the phrase "completion of the investigation."

On January 28, 1996, Izquierdo, while on duty, had an altercation with a civilian who filed a complaint against him with the Wilmington Police Department's ("WPD") Office of Professional Standards ("OPS") on January 31, 1996. Sergeant Corey Staats investigated the charges; his last investigative act was on April 8, 1996. He completed his investigative report on April 12, 1996.[4]

[3] Thus, the only issues remaining for resolution are those framed by the parties' briefs submitted to the Court in this effort.

[4] A copy of that report appears at A-143ff of the App. to Pl.'s Opening Br. for Judgment on Paper Record ("Pl.'s App.").

Sergeant Staats' supervisor, Captain Gilbert Howell, approved and signed Sergeant Staats' report either on April 12, 1996, or on April 15, 1996.[5] It is the practice of OPS to prepare and deliver to the officer who is the subject of disciplinary action a "packet" that includes the charging papers. The charging papers were presented to Izquierdo on April 17, 1996. The Complaint Hearing Board ("CHB"), the first stage of the disciplinary process, convened on Monday, May 13, 1996.[6]

At the CHB hearing, Izquierdo sought dismissal of the charges because the hearing was not held within thirty days of the completion of the investigation. The CHB accepted Izquierdo's argument that the investigation had been completed on April 12, 1996, and dismissed the charges.[7] OPS sought review of that decision by the WPD's Appeal Board. The Appeal Board determined that the thirty-day period began on April 17, 1996, when Izquierdo was served with the charges.[8] The dismissal was set aside, and the hearing before the CHB went forward, with the result that significant disciplinary sanctions were imposed upon Izquierdo.

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[5] The date, as will be seen, is important and will be assessed in greater detail.

[6] A more comprehensive review of the events leading up to this litigation can be found in the Court's memorandum opinion on summary judgment.

[7] The CHB unanimously concluded that "the date of completion of the investigation has been established to be April 12th, 1996, as per the information given by Captain Gilbert Howell and members of the Office of Professional Standards." Pl.'s App. at A-166.

[8] *Id*. at A-177. The Appeal Board did not set aside the CHB's finding of when Captain Howell had approved Sergeant Staats' investigative report.

Izquierdo's right to a prompt disciplinary hearing is governed by the WPD's Rules and Regulations (the "Directives" or "DIR") 8.7(E) which provides: "In the event the accused is entitled to a hearing, a hearing shall be scheduled within a reasonable time from the alleged incident, but in no event more than thirty (30) days following the conclusion of the investigation, unless waived in writing by the charged officer."[9] The phrase "conclusion of the investigation" is not defined,[10] and, therefore, must be construed.[11] In its memorandum opinion addressing

[9] *Id*. at A-120. A police officer's right to a prompt hearing is, in the first instance, guaranteed by the Law-Enforcement Officer's Bill of Rights ("LEOBOR"), 11 *Del.C.* Ch. 92. LEOBOR confirms an officer's right to a hearing "in no event more than 30 days following the conclusion of the internal investigation, unless waived in writing by the charged officer." 11 *Del.C.* § 9204. LEOBOR, however, gives way to the collective bargaining agreement governing the police officer's employment. When a police officer is entitled to a hearing, it "shall be conducted in accordance with LEOBOR unless a contractual disciplinary grievance procedure executed by and between the agency and the bargaining unit of that officer is in effect, in which case the terms of that disciplinary grievance procedure shall take precedence and govern the conduct of the hearing." 11 *Del.C.* § 9203. As a member of the Fraternal Order of Police, Lodge No. 1, Izquierdo's employment was subject to its Collective Bargaining Agreement with the City which applied to officers in the WPD with a rank of Lieutenant or below. Pl.'s App. at A-65. By § 11.1 of the Collective Bargaining Agreement, the City (through the WPD) could "[establish] work rules and regulations not inconsistent with the provisions of [the Collective Bargaining A]greement." *Id*. at A-80. Because the Collective Bargaining Agreement is silent with respect to the scheduling of disciplinary hearings, the Directives control.

[10] Although a similar phrase appears in § 9204 of LEOBOR, LEOBOR supplies no definition either.

[11] Izquierdo argues that the City breached the Collective Bargaining Agreement and the DIRs with the determination by the Appeal Board that the "conclusion of the investigation" occurred when he was charged. He also asserts a number of derivative arguments, all variations on a theme that the City misrepresented the meaning of "conclusion of the investigation" to the CHB and the Appeal Board.

summary judgment, this Court reviewed the general principles governing its function in evaluating contractual terms:

> In interpreting a contract, the Court must first examine the entire agreement to determine whether the parties' intent can be discerned from the express words used or, alternatively, whether its terms are ambiguous. Initially, the Court looks to the terms of the contract. If the terms are clear on their face, the Court must apply the meaning that would be ascribed to the language by a reasonable third party. Where there is an ambiguity in the contract—that is, where a contract's provisions are reasonably susceptible to two or more meanings—the Court should consider extrinsic evidence to glean the reasonable shared expectation of the parties at the time of contracting.[12]

Izquierdo contends that "conclusion of the investigation" has a plain meaning: when the work of the investigators has reached its end, as evidenced by the approval of the officer supervising the OPS investigation (*i.e.*, in this instance, Captain Howell's approval of Sergeant Staats' report).[13]

The City argues for a different interpretation of the phrase at issue. It does not, however, contend that the question of when the investigation was completed was exclusively for the disciplinary process to resolve.

[12] *Izquierdo*, 2004 WL 2290811, at *9 (citations and internal quotation marks omitted).

[13] Other potential dates have been suggested from Izquierdo's perspective: the last actual investigative act and when the investigator's report is final (*i.e.*, before it is submitted for supervisory approval). It appears that Izquierdo has abandoned any such contention. Neither date would work because the supervisor, instead of approving the report, could potentially order additional investigative efforts. As long as such a potential reasonably exists, the investigation cannot be considered "concluded."

The City argues that the "conclusion of the investigation" occurs when the officer is served with the charging papers and the "packet." First, it asserts that the time for a hearing is logically related to the officer's receipt of the charges. Indeed, the officer has no right to a hearing until he is charged.[14] Second, by WPD DIR 8.7(D), "[a] complaint hearing board will be convened when . . . [t]he complaint lodged does not fall within the Summary Punishment Process."[15] This, according to the City, confirms that no hearing can be scheduled until the complaint is "lodged." Third, any delay in service of the charging papers would impinge upon the officer's time to prepare for the hearing; a request for a continuance, which might cure the consequence of such delay, would, in such event, be a poor substitute for a timely hearing. Fourth, the City points to what it as a course of conduct in which the WPD's disciplinary panels have interpreted the "conclusion of the investigation" to be the time of presentation of the charges.

The Court turns first to the City's argument that there has been a course of conduct that evidences the meaning to be given to "conclusion of the investigation." The actions of the parties under a contract may sometimes be

[14] *See* 11 *Del.C.* § 9203(3).
[15] Pl.'s App. at A-120.

helpful in discovering their intent at the time of entering into the contract;[16] this approach may be especially useful in the labor context. The pattern, however, must be regular and discernable. The parties have identified four instances in which questions involving the "conclusion of the investigation" have been addressed. As will be seen, however, the approach has not been consistent. In *Hatchet I*,[17] the testimony of the investigating officer was summarized: "Once his investigation was completed, he prepared the charge papers on 23 FEB. 1995."[18] The panel treated February 23, 1995, as the date on which the thirty-day period began to run, without reference to when the officer was served with the charges. The same panel reached a similar conclusion in *Hatchet II*.[19] There, the investigating officer "completed his investigation on March 3, 1995, at which time he prepared the charge papers."[20] Again, the panel did not inquire as to when the officer received the charging papers. On the other hand, in *Dixon*[21] and in

[16] *See, e.g., City of Wilmington v. Wilmington FOP Lodge #1, Inspectors and Captains*, 2004 WL 1488682, at *7 (Del. Ch. June 22, 2004); *see* RESTATEMENT (SECOND) OF CONTRACTS § 202(5) ("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.").
[17] Defs.' App. to Defs.' Opening Br. in Supp. of a Decision on a Paper Record at B-1.
[18] *Id*. at B-8.
[19] *Id*. at B-11.
[20] *Id*. at B-15.
[21] Pl.'s App. at A-192.

Berrien,[22] the hearing board concluded that the charging of the officers triggered the right to a hearing and the running of the thirty-day period.[23] In sum, there is no discernable and reliable course of conduct upon which the Court can formulate an understanding of the intentions of the drafters of DIR 8.7(E).[24]

That leaves the Court with the words written in DIR 8.7(E). To start, the drafters could easily have chosen the date of presentation of charges as the triggering date for the thirty-day period.[25] That, of course, was not done. Instead, the standard is "conclusion of the investigation." It appears simple: it is when the investigation is completed. Those words have no special or unique meaning within the WPD or even OPS that tie the time period for a hearing to the giving of notice of the charges.[26] Instead, in the WPD, "an investigation is concluded outside of

[22] *Id*. at A-202.
[23] The police officers charged in these two matters held much higher rank and, thus, were not subject to the Collective Bargaining Agreement and received a hearing before a panel that included officers of other police departments.
[24] A fifth matter cited by the parties (*id*. at A-180) involved a rejection of summary discipline and a formal request for a hearing, followed by additional internal investigation, all factors demonstrating that its relevance here is nil.
[25] For example, in Maryland, by comparable statute, the officer's hearing "will commence thirty (30) days after notification is sent to the Accused." *Cochran v. Anderson*, 535 A.2d 955, 957 (Md. 1988) (citing Md. Code Ann. Art. 27, §§ 727-734 D).
[26] The charges could not be served until the commanding officer had approved the investigative officer's determination.

OPS when the commanding officer would sign off on the investigation."[27] The same standard, however, also applies within OPS.[28]

The City has demonstrated that there is no right to a hearing until charges are presented,[29] and it tenders cogent policy arguments as to why the period for holding a hearing should run from when the charges are presented to the officer and the right to a hearing materializes. The thirty-day period achieves two purposes: (1) it assures a timely hearing and (2) it provides the officer with adequate time to prepare a defense. Delay between approval of the investigative report by the supervisor of the investigating officer and presenting charges to the accused, for example, could act to deprive the accused of a fair opportunity to meet

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[27] Pl.'s App., Ex. D at 74 (Dep. of Master Sergeant Henry T. Alfree, who was attached to OPS).

[28] Q. [by Mr. Battaglia]: So that we could consider that [Captain Howell's signing off on Sergeant Staats' report] the conclusion of the investigation?

A. [M.Sgt. Alfree]: Yeah, I guess so. I could agree to that.

Id.

[29] By DIR 8.6(C), a disciplinary investigation can be concluded with one of three findings by the investigating officer (and approved by his supervisor): (1) substantiated—the proof is deemed sufficient to proceed; (2) unsubstantiated—the evidence is insufficient to confirm the allegation; and (3) unfounded—the allegation is demonstrably false or without any credible evidence in its support. In this instance, Sergeant Staats concluded that the allegations against Izquierdo were "substantiated" and Captain Howell concurred. This does not, however, establish the right to a hearing. That right is controlled by DIR 8.7(D) which provides that "a Complaint Hearing Board will be convened when . . . [t]he complaint lodged [cannot be resolved through] the Summary Punishment Process." The City follows this analysis to reach a conclusion that Izquierdo does not dispute (Pl.'s Opening Br. for Judgment on Paper Record at 8): until charged there is no right to a hearing.

the charges. Those policy arguments, however persuasive, do not allow the Court to ignore the regularly understood meaning of the words chosen to express the standard.[30] Moreover, the words chosen clearly accommodate the goal of a hearing following promptly after the investigative work is finished.

At the core of the parties' dispute is the proper interpretation to be given to Directive 8.7(E). Although this directive applies as a matter of contract, two other factors should at least be considered. First, the operative language of the Directive tracks the language of LEOBOR which sets a schedule for a police officer's disciplinary hearing. Presumably, the Directive was drafted to incorporate the statutory standard. Unfortunately, nothing in LEOBOR's history has been cited for insight into the meaning of "conclusion of the investigation." One subsection of LEOBOR offers some limited guidance. By 11 *Del.C.* § 9200(c)(11), "[a]t the conclusion of the administrative investigation, the investigator shall inform in writing the officer of the investigative findings and any recommendation for further action." Presumably, the administrative investigation of § 9200(c)(11) is

[30] Although the Court has focused on the phrase and the specific words used, it has looked to the Collective Bargaining Agreement and the applicable Directives as a whole, considering primarily the Directives cited by the parties, in order to ascertain the broad-based governing intent. That effort, however, does not change the conclusion as drawn.

the same process as the internal investigation of § 9204. The requirement of § 9200(c)(11) that, at the conclusion of the investigation, the investigator notify the officer of his findings and "any recommendation for further action" suggests that service of the charges would be a type of "further action" that would come later, *i.e.*, service occurs after the investigation is completed. In any event, this provision hints that the investigation's "conclusion" would occur before the charges are actually served. Second, the Directives were issued by the WPD; there is no evidence that they were negotiated, at least as that concept is commonly understood. Izquierdo, however, does not argue that any ambiguity in the directives must be construed against the City (or the WPD) as the party responsible for their drafting.[31]

In sum, there is no reason to give the phrase "conclusion of the investigation" any interpretation other than one faithful to the words chosen. Neither pattern and practice nor policy considerations can alter the meaning to be

[31] *See, e.g.*, *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003) (applying doctrine of *contra preferentem*).

ascribed to them. Therefore, the investigation was concluded when the commanding officer signed off on the charges.[32]

With that conclusion, the Court turns to the following question: when was Izquierdo's investigation concluded, *i.e.*, when did Captain Howell sign off on Sergeant Staats' report?

Sergeant Staats, although he did not write in the date, signed the investigative report on April 12, 1996. He turned it over to Captain Howell, his commanding officer, on that date and received it back from Captain Howell, signed, on April 15, 1996.

At Izquierdo's first hearing before the CHB on May 13, 1996, Captain Howell stated that he signed the report on April 12, 1996.[33] Although he indicated to the Appeal Board that he had signed it on April 15, 1996, the most persuasive evidence upon which the Court can rely is his testimony closest to the event in question. There is nothing in the record to persuade the Court that his initial testimony was wrong. Thus, the Court finds that Captain Howell signed and

[32] In its memorandum opinion on summary judgment, 2004 WL 2290811, at *9, the Court concluded that the phrase, "conclusion of the investigation," was ambiguous. After considering the extrinsic evidence, the Court finds it to be of little help in assessing the parties' intent. After that effort, the most persuasive indicator, perhaps not surprisingly, is the phrase itself.
[33] Pl.'s App. at A-166.

approved the investigative report on April 12, 1996; that, accordingly, established the date of the conclusion of the investigation into Izquierdo's conduct.

The CHB convened on May 13, 1996, more than thirty days after conclusion of the investigation on April 12, 1996.[34] In so doing, it, and thus the City, violated Izquierdo's contractual rights to a hearing within thirty days. As such, the City, by force of contract and its resulting breach, lost any right to discipline Izquierdo as a result of the charges arising from the incident of January 28, 1996.

Accordingly, Izquierdo is entitled to judgment declaring that the discipline was improperly imposed in breach of contract.[35] Counsel are requested to confer and to submit a form of order to implement this letter opinion.[36]

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

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[34] The hearing was held on a Monday. The thirty-day period expired during the previous weekend. Nothing in the LEOBOR, the Collective Bargaining Agreement, or the Directives provides for deadlines to carry over to the next business day. The City does not contend otherwise. As a general matter, the law of contracts does not, by default, impose such an extension. *See, e.g.*, *Swiss Bank Corp. v. Dresser Indus., Inc.*, 141 F.3d 689, 693-95 (7th Cir. 1998) (applying Delaware law). Moreover, the WPD is open for business during the weekend.

[35] The Court recognizes that a hearing may be necessary to determine the scope of the remedy to which Izquierdo is entitled.

[36] To the extent that Izquierdo has asserted other arguments, *see* note 11, *supra*, they are rendered moot by this conclusion.